



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

July 14, 2010

Ms. Jacqueline E. Hojem
Public Information Officer
Metropolitan Transit Authority
P.O. Box 61429
Houston, Texas 77208-1429

OR2010-10474

Dear Ms. Hojem:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 386627.

The Metropolitan Transit Authority of Harris County (the "authority") received a request for nine categories of information pertaining to the East End Light Rail Corridor, the Storage and Inspection Facility, the Repair Operations Center, and the Segment 3 underpass. You state the authority has released information responsive to four of the requested categories of information. You indicate information responsive to one of the requested categories of information does not exist.¹ You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.² We have also received and considered comments from the requestor. See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

¹We note the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); see also Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.103 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.*

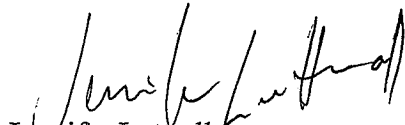
You explain the authority entered into a design-build contract with Houston Rapid Transit Joint Venture ("HRT") for a light rail expansion project, and HRT subsequently contracted Omega Engineers, Inc. ("Omega") to provide design services pertaining to parts of the project. You state, and provide documentation showing, Omega submitted a letter to the authority and HRT urging them to reconsider the "arbitrary and wrongful" decision to reduce the scope of Omega's design services under its contract with HRT. The letter states the reduction of scope will have a negative economic impact on Omega and its employees and Omega's attorneys have been instructed to "take all necessary steps to protect [Omega's] interests under the [c]ontract and at law." You assert this letter constitutes a threat to file suit against the authority. You state, and provide the original petition showing, Omega filed suit against HRT for breach of contract and injunctive relief. You explain that in its original petition, Omega states HRT and the authority made the decision to reduce the scope of services. We note this pending litigation involves only Omega and HRT, and you do not

assert Omega or HRT has sought to make the authority a party to this litigation. You claim that, based on the aforementioned letter and the pending lawsuit against HRT, the authority reasonably anticipated litigation with Omega at the time the authority received the present request for information. However, we note that, although Omega has stated it will act to protect its interests, you do not inform us that Omega has taken any concrete steps towards the initiation of litigation against the authority. Consequently, after reviewing your arguments, we find you have not established that the authority reasonably anticipated litigation when it received the request for information. Accordingly, the authority may not withhold any of the submitted information under section 552.103 of the Government Code. As no other exceptions to disclosure have been raised, the submitted information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 386627

Enc. Submitted documents

c: Requestor
(w/o enclosures)